STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA A. HERBRANDSON, Plaintiff-Appellant,	UNPUBLISHED February 19, 2004
v	No. 244523 Kalamazoo Circuit Court
ALC HOME INSPECTION SERVICES, INC., Defendant-Appellee.	LC No. 02-000037-AV

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

In this action involving a home inspection and interpretation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, plaintiff appeals by leave granted from an order of the circuit court, which affirmed on appeal a judgment of the district court. The district court, following a bench trial, entered a judgment in favor of plaintiff in the amount of $330 after ruling that defendant negligently performed a home inspection on plaintiff's behalf. The district court found that damages were limited pursuant to a limited liability provision in the home inspection contract, and that plaintiff did not establish a claim under the MCPA despite defendant's negligence. On appeal, plaintiff argues that defendant's negligence could and did constitute a violation of the MCPA. We conclude that the relevant provisions of the MCPA are not implicated in this case. Accordingly, we affirm.

I. BASIC FACTS and PROCEDURAL HISTORY

Plaintiff made an offer to purchase a home on a standard buy-sell agreement, which included a provision assuring the customary right of inspection. Plaintiff contracted with defendant to perform the pre-purchase home inspection. Defendant's agent, Larry Camburn, performed the inspection in plaintiff's presence. Additionally, Camburn prepared a report and presented it to plaintiff. Although Camburn pointed out that there were deck railings that were loose and that some deck boards needed replacing, he declared the deck "serviceable." Accordingly, plaintiff elected not to pursue the issue of deck repairs with the sellers prior to completing the purchase of the property. Subsequent to completing the purchase and moving in, plaintiff discovered that the deck was structurally unsound and unsafe. Further, the grading around the base of the A-frame home was improper, resulting in the accumulation of water around the foundation and soil coming into contact with cedar shake siding, which allowed for insect infestation and rotting.

Plaintiff commenced the instant suit against defendant in the district court, alleging negligence and violations of several provisions of the MCPA. Following several days of trial, the district court issued a written opinion and judgment, in which it found that the inspector had acted negligently, and in which he awarded plaintiff a judgment of $330 as was consistent with the limited liability clause found in the contract between plaintiff and defendant. The judgment amount reflected a refund of the inspection price, the cost of filing the suit, and a statutory attorney fee of $30. Additionally, the district court rejected plaintiff's claim that the actions of the inspector violated the MCPA. The court opined, in part:

> The [c]ourt has already held that the [d]efendant was negligent in conducting the inspection and completing the report in that the defendant failed to either detect or to report material defects in the property with respect to the condition of the deck. However, the authority cited by plaintiff is distinguishable from the facts in this case as in each of those cases the conduct involves intentional acts which led to a finding by the court that the offending party had violated the act.
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> * * *
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> The court finds the situation at hand analogous to the facts in *Nelson v. Ho*, 222 Mich. App. 74 (1997). In that matter the court held that allegations of misconduct in the actual performance of medical services not within the purview of the MCPA. While the court specifically carved out an exception from the protections of the act for the liberal arts or the learned professions, distinguishing those practices from the meaning of trade or commerce even if performed for profit, it did hold the professions accountable under the act for activities conducted in the pursuit of entrepreneurial, commercial or business aspects of the practice of medicine.
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> In the instant matter, the facts established that although the service was performed in a negligent manner, the complaint is poor performance in conducting the work, not an intentional disregard for the contents of the written agreement, or misrepresentations in what was to be performed, or some conduct which could begin to meet the criteria of unfair, unconscionable or deceptive conduct by the defendant. Accordingly, this court cannot find that the defendant violated the Michigan Consumer Protection Act.

Plaintiff appealed to the circuit court, which affirmed the district court's ruling. Plaintiff then filed an application for leave to appeal, challenging the rulings of the lower courts, and this Court granted leave.

II. ANALYSIS

A. Appellate Arguments

On appeal, plaintiff argues that the district court's opinion reflects that it believed that plaintiff was required to prove an intentional or willful violation of the MCPA. This ruling, it is argued, erroneously placed an additional burden on plaintiff that was not dictated by the clear

language of MCL 445.903(1)(s), (bb), and (cc). Plaintiff further argues that the district court erred when it failed to find that plaintiff had shown a compensable violation of the MCPA when she established negligent misrepresentations. Finally, plaintiff maintains that the circuit court erred when it affirmed the decision of the district court.

Defendant argues that a review of the district court's opinion reveals that it did not add an "intent" element to the requirements that must be shown to establish a violation of MCL 445.903(1)(s), (bb), and (cc). Instead, the court held that defendant's actions did not rise to the level of a violation of the MCPA because defendant's employee merely acted negligently. Further, defendant argues that because the district court found that the inspector committed ordinary negligence, and because plaintiff has not argued that this finding was clearly erroneous, no action arises under the MCPA. According to defendant, the Legislature never intended that negligent actions in and of themselves constitute unfair, unconscionable, or deceptive actions prohibited by the act. If it did so intend, then because plaintiff presented no evidence at trial of her legal expenses, she failed to provide a necessary element of damages under the act. Finally, defendant asserts that the limited liability clause in the contract between the parties applies to an action under the MCPA.

B. Standard of Review

The basis for our holding concerns construction of the MCPA, which is a matter reviewed de novo on appeal. *In re MCI Telecom Complaint,* 460 Mich 396, 413; 596 NW2d 164 (1999). We find it unnecessary to review for error any factual findings.

C. Discussion

Plaintiff relies on MCL 445.903(1)(s), (bb), and (cc) of the MCPA in support of her claims.

> (1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:
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> * * *
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> (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.
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> * * *
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> (bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.
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> (cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

We first address subsections 3(1)(bb) and (cc), which both include the language "material to the transaction." This language was analyzed in *Zine v Chrysler Corp*, 236 Mich App 261, 280-281; 600 NW2d 384 (1999), wherein this Court stated:

> Thus, a "transaction" is the business conducted between the parties, which in this case would be the negotiations that concluded in Zine's agreement to buy the truck. Because subsection 3(1)(cc) refers to the failure to reveal information material to the transaction, it can be reasonably understood only as referring to information withheld during the negotiations and up to the time of the transaction, in this case a sale of a vehicle, is complete. Information that was not included in a disclosure made *after* the "transaction" . . . was completed would not be material to that transaction. Therefore, we hold that Chrysler's disclosure of information about some states' lemon laws while failing to disclose information about Michigan's lemon law, which came to a buyer's attention only after the transaction had been completed, is not actionable under subsection 3(1)(cc). [Emphasis in original.]

Here, plaintiff argues that MCL 445.903(1)(bb) and (cc) were violated where defendant made material misrepresentations and failed to disclose material facts with respect to the condition of the deck and other features of the home *after* a home inspection contract had been entered into and *after* completion of the home inspection. Consistent with this Court's ruling in *Zine*, the "transaction" consisted of the negotiations that concluded in the agreement between plaintiff and defendant that, for a fee, defendant would inspect the house. Defendant's alleged misrepresentations and silence occurred after the agreement was reached to provide home inspection services, and thus they were not material to plaintiff entering into the home inspection contract, or in other words, entering into the "transaction." Therefore, MCL 445.903(1)(bb) and (cc) are not implicated.

In regard to MCL 445.903(1)(s), the *Zine* panel held that, despite the absence of the language "material to the transaction," "a material fact for purposes of the MCPA would likewise be one that is important to the transaction or affects the consumer's decision to enter into the transaction." *Zine, supra* at 283. Accordingly, plaintiff's claim under subsection 3(1)(s) fails for the same reasons discussed above in relation to subsections 3(1)(bb) and (cc).

Moreover, this Court in *Zine*, *supra* at 282-283, stated:

> In *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 182-183; 341 NW2d 268 (1983), this Court stated that it is proper to construe the provisions of the MCPA "with reference to the common-law tort of fraud." One element of fraud is that the defendant made a material representation. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

Relevant here is another common-law element of fraud which is that a defendant must make the misrepresentation knowing it was false or making it recklessly, without any knowledge of its truth. *Hi-Way Motor, supra* at 336. The false material representation required to establish fraud may be satisfied by the failure to divulge a fact or facts of which the defendant must have actual knowledge. *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 517; 309 NW2d 645 (1981); M Civ JI 128.02. There was no evidence presented that

defendant had knowledge of defective conditions; he was simply negligent in failing to discover the conditions. Further, plaintiff does not assert in her appellate brief that defendant had knowledge of defective conditions, nor that he acted recklessly. Therefore, plaintiff has no claim under the cited MCPA provisions.

Affirmed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Jane E. Markey